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In Reply Refer to:

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In re: New Life Broadcasting, Inc.
WNVM(FM) (formerly WBRQ), Cidra, PR
Facility ID No. 1891
File No. BPH-20050124AJS

**Application for a Minor Change to a
Licensed Facility**

Petition for Reconsideration

File No. BLH-20070518ABQ

Application for Covering License

Informal Objection

Gentlemen:

We have before us a Petition for Reconsideration (the "Petition") filed by Josantonio Mellado-Romero, *et al.*¹ ("JMR"),² on May 8, 2006. The Petition asks for reconsideration of an April 4, 2006, decision granting New Life Broadcasting, Inc.'s ("New Life" or "Licensee") referenced application, as

¹ The other petitioners are: Carmen Maria Gonzalez Vega; Luis Arturo Guzman Lluberes; and Ana Maria Velez Borrás.

² JMR was licensee of WOYE(FM), Rio Grande, Puerto Rico, at the time the Petition was filed; *see also* n.7, *infra*.

amended, for minor change (the “Minor Change Application”)³ to the licensed facilities of Station WNVN(FM), Cidra, Puerto Rico (the “Station”).⁴ On May 23, 2006, New Life filed an Opposition (the “Opposition”), to which JMR replied on June 2, 2006 (the “Reply”).⁵

We also have before us New Life’s application for license to cover (the “License Application”)⁶ the Station’s construction permit. On June 19, 2007, the current licensee of WOYE(FM),⁷ Jose J. Arzuaga (“Arzuaga”), filed an Informal Objection (the “Objection”) to the License Application, which he supplemented on September 21, 2007 (“First Supplement”), and on November 23, 2007 (“Second Supplement”). New Life opposed the Objection on June 28, 2007 (“2007 Opposition”).⁸

Additionally, on November 23, 2007, Arzuaga filed a “Supplement to the Petition for Reconsideration” (“Supplement to Petition”), generating a new round of pleadings.⁹ For the reasons set forth below, we deny the Petition, dismiss its Supplement, deny the Objection, dismiss its two Supplements, and grant the License Application.

Background. In the Minor Change Application, New Life proposed to relocate the Station’s transmitter site and change its technical facilities. The Minor Change Application certified that the proposed facilities would comply with Section 73.315 of the Commission’s Rules (the “Rules”),¹⁰ which

³ File No. BPH-20050124AJS; *see also* n.4, *infra*.

⁴ *Letter to New Life Broadcasting, Inc.*, Reference 1800B3 (Aud. Div. Apr. 4, 2006) (“*Staff Decision*”). JMR had filed an Informal Objection to the captioned application on April 18, 2005, and a corrective filing to the Informal Objection on April 21, 2005, which were opposed by New Life on May 6, 2005. JMR filed a supplement to its Informal Objection on June 1, 2005, which New Life opposed on June 23, 2005. JMR filed another supplement on October 17, 2005. The Informal Objection was denied and application granted by the *Staff Decision*. *See also Broadcast Actions*, Public Notice, Report No. 46209 (rel. Apr. 7, 2006).

⁵ On June 14, 2006, the Licensee filed a “Petition for Leave to File Response” and a “Response” to JMR’s Reply, to which JMR, on June 28, 2006, filed an “Opposition” to Licensee’s “Petition for Leave to File Response.” These pleadings are not authorized by the Rules and will not be considered here. *See* 47 C.F.R. § 1.45; *see also, e.g., Secret Communications, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 9139 n.1 (2003) (dismissing “Motion for Disclosure of Documents” as unauthorized pursuant to Section 1.45); *KOLA, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 14297, 14310 (1996); and *Kin Shaw Wong*, Memorandum Opinion and Order, 11 FCC Rcd 11928, 11930 (1996) (rejecting argument that staff should have considered arguments raised in unauthorized pleadings).

⁶ File No. BLH-20070518ABQ.

⁷ JMR assigned Station WOYE(FM) to Arzuaga on March 14, 2007, pursuant to the staff’s grant of Application File No. BALH-20061031ACN.

⁸ On December 10, 2007, Licensee filed an “Opposition” to the Objection’s Second Supplement. On December 26, 2007, Arzuaga filed a “Reply” to Licensee’s “Opposition” to the Objection’s Second Supplement. On March 28, 2008, Licensee filed a “Supplement to [its] Opposition” to the Objection’s Second Supplement, to which Arzuaga filed a “Response” on April 28, 2008.

⁹ On December 10, 2007, Licensee filed an Opposition to the Supplement to Petition. On December 26, 2007, Arzuaga filed a Reply to Licensee’s Opposition to the Supplement to Petition. On March 28, 2008, Licensee filed a “Supplement to [its] Opposition” to the Supplement to Petition, to which Arzuaga filed a “Response” on April 28, 2008.

¹⁰ 47 C.F.R. § 73.315.

requires that an FM station place at least a 70 dB μ (3.16 mV/m) strength signal to its entire community of license. It also provided a technical exhibit purporting to show provision of a 70 dB μ signal to all of Cidra, Puerto Rico.¹¹

In its pre-grant objection, JMR argued that the Licensee's Minor Change Application did not provide line-of-sight to the community of Cidra, Puerto Rico, in violation of Section 73.315 of the Rules.¹² JMR provided terrain profiles along with an engineering analysis purporting to show that line of sight was obstructed to the community of Cidra. The staff found that JMR's line-of-sight claim was without merit because JMR had not conclusively demonstrated that a major terrain obstruction was in the proposed antenna site's path and that the Minor Change Application otherwise complied with the Commission's technical rules.¹³

Discussion. The Commission will consider a Petition for Reconsideration only when petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁴

Procedural Issue. Supplement to Petition. With respect to the Supplement to Petition, Section 1.106(f) of the Rules provides that "[t]he petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that action is defined in [Section] 1.4(b) of these rules No supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30-day period, will be considered *except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.*"¹⁵ Arzuaga did not file a motion for leave to supplement his Petition. Accordingly, the Supplement to Petition will be dismissed without consideration.¹⁶

Substantive Issues. The Petition. In its Petition, JMR reiterates the argument made in its earlier objections: that the Licensee's Minor Change Application should not have been granted because "the required coverage of Cidra, the community of license, was thwarted by substantial terrain impediments."¹⁷ It disputes the *Staff Decision* conclusion that it had failed to adequately demonstrate prohibited line-of-sight deficiencies. The Petition also includes a new alternative coverage showing based

¹¹ See Minor Change Application, as amended, Section III-B, Item 14 and Attachment 25.

¹² Section 73.315(b) states that the location of the antenna site should be so chosen that the line-of-sight can be obtained from the antenna over the principal city to be served. In no event should there be a major obstruction in this path.

¹³ *Staff Decision* at 2.

¹⁴ See 47 C.F.R. § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *In re National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

¹⁵ 47 C.F.R. § 1.106(f) (emphasis added); see also *KOLA, Inc.*, 11 FCC Rcd at 14310 (1996).

¹⁶ See *Educational Television Association of Metropolitan Cleveland*, Memorandum Opinion and Order, 18 FCC Rcd 15117, 15120 (2003).

¹⁷ Petition at 1.

on Longley-Rice Tech Note 101 calculations.¹⁸ It purports to show that only 22.9 percent of the community boundary of Cidra would receive the Station's signal due to the terrain obstruction.¹⁹ JMR argues that it is permitted on public interest grounds to submit this new evidence by Section 1.106(c)(2) of the Rules.²⁰

In its Opposition, New Life argues that the Petition should be dismissed pursuant to Section 1.106(c) of the Rules because it does not rely on new facts or changed circumstances and does not demonstrate that consideration of JMR's new showings is necessary or in the public interest.²¹ In the alternative, New Life argues that the Petition should be denied on substantive grounds because JMR fails to cite any Commission precedent where a petitioner "has successfully imposed an alternative contour methodology on an applicant for an FCC license," as JMR is attempting to do here.²² In Reply, JMR reiterates its argument that Section 1.106(c)(2) allows it to submit this new evidence in the public interest.²³

Initially, we reject JMR's proffer of the Tech Note 101 study which it submitted in this case for the first time on reconsideration. As the Commission has stated: "We cannot allow a party to 'sit back' and hope that a decision will be in its favor, and when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."²⁴ JMR's submission of the Tech Note 101 study constitutes just such an attempt.

Furthermore, even were we to consider the new material presented in JMR's Petition, JMR's showing does not demonstrate that the field strength value of the signal at the community of Cidra failed to comply with Section 73.315 of the Rules. The *Staff Decision* found that JMR did not demonstrate that a major obstruction prevented coverage of the community with the requisite signal strength, and we concur with that assessment after reviewing JMR's supplemental engineering showing. In addition, we have evaluated the topographic profiles of the area between the Station's transmitter site and the community of Cidra to assess the impact of terrain on predicted coverage to the area within the legal boundaries of Cidra. Our review shows the legal boundaries of Cidra to extend between the 201-degree azimuth and the 207-degree azimuth, relative to the proposed transmitter site. Evaluating each of the

¹⁸ This methodology was developed by the National Telecommunications and Information Administration and based on NBS Technical Note 101. It is permitted by Section 73.313(e) and (f) of the Rules to calculate the distances to contours.

¹⁹ See Engineering Statement of Clarence M. Beverage, Communications Technologies, attached to Petition.

²⁰ See 47 C.F.R. § 1.106(c)(2) which states: "A petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only . . . [if] [t]he Commission or the designated authority determines that consideration of the facts relied on is required in the public interest." (emphasis added).

²¹ Opposition at 2.

²² *Id.* at 3.

²³ Reply at 3.

²⁴ See *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941); see also *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Banks, Redmond, Sunriver and Corvallis Oregon)*, Memorandum Opinion and Order, 19 FCC Rcd 10068 (2004).

radials extending in the direction of Cidra, the most significant terrain occurs at the 206- and 207-degree azimuths.²⁵ However, we have determined that the terrain profiles in this arc do not include a major obstruction. Additionally, we note that line-of-sight coverage of the entire community of license is not an absolute requirement.²⁶ Adequate coverage may still be obtained from a diffracted signal.²⁷ The narrow area predicted to experience some amount of terrain shielding amounts to less than 10 percent of the total area within the legal boundaries of Cidra. Thus, the proposed facility is predicted to provide 70 dB μ coverage to more than 80 percent of the residential area of Cidra.²⁸ JMR has not shown that the *Staff Decision* was erroneous, and we will deny the Petition.

The Objection. With respect to Arzuaga's Objection, initially, we stress the stringent standard of Section 319(c) of the Communications Act of 1934, as amended (the "Act"),²⁹ by which Arzuaga's challenge to the License Application must be judged. Upon grant of the Minor Change Application, New Life has a protected interest in grant of the License Application. Under Section 319(c), New Life is entitled to a presumption that the Section 309 public interest determination made during the entire construction permit proceeding continues in effect unless "extraordinary circumstances"³⁰ have arisen that would make operation of the Station against the public interest.³¹ Under this standard, Arzuaga's challenge fails.

For the reasons set forth above, we reject without further consideration the repetitious arguments included in Arzuaga's Objection and the Objection's First Supplement to the License Application.³² The

²⁵ This is consistent with the findings in the October 17, 2005, filing by JMR. *See* n.4, *supra*.

²⁶ *See Rush County Broadcasting Co., Inc.*, Memorandum Opinion and Order, 26 FCC2d 480 (1970) (line-of-sight to the community is not an absolute requirement); *see also Margaret C. Schaller*, Hearing Designation Order, 5 FCC Rcd 5329 (1990) (opposing party has not made a convincing showing that a terrain obstruction precluded line-of-sight to the proposed community of license); and *Helen Broadcasters, Inc.; Shull Broadcasting Company, Inc.; Joseph Vandegriff; Anthony Lamar Canup and George M. Pass, d/b/a White County Broadcasting*, Hearing Designation Order, 5 FCC Rcd 5642 (1990) (holding that failure to provide line-of-sight signal coverage does not necessarily imply deficient coverage); *Helen Broadcasters, Inc. et al.*, Hearing Designation Order, 5 FCC Rcd 5642 (1990) (same); and *Idaho Broadcasting Consortium, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5264 (1996) (rejecting objector's reliance on single terrain profile to show "major obstruction").

²⁷ *See Lawrence Bernstein, Esq., and David D. Oxenford, Esq.*, Letter, 24 FCC Rcd 7400, 7403 (MB 2009); *see also Lightning Bug Broadcasting, et al.*, Hearing Designation Order, 5 FCC Rcd 5404 (MMB 1990).

²⁸ *See John R. Hughes*, Memorandum Opinion and Order, 50 Fed. Reg. 5679 (1985) (coverage of 80 percent of a community's residential area with a "city-grade" signal constitutes "substantial compliance" with the Commission's city coverage requirements).

²⁹ 47 U.S.C. § 319(c).

³⁰ *See Whidbey Broadcasting Service, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8726, 8727 (1989).

³¹ *See Focus Cable of Oakland, Inc.*, 65 FCC 2d at 39-40.

³² The Commission will not revisit issues "on which the tribunal has once deliberated and spoken." *Chapman S. Root Revocable Trust*, Memorandum Opinion and Order, 8 FCC Rcd 4223, 4224 (1993), quoting *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967, *rehearing denied*, 384 U.S. 947, *petition to reopen denied*, 4 FCC 2d 608 (1966). *See also, Pacific Broadcasting of Missouri*, Memorandum Opinion and Order, 19 FCC Rcd 10950, 10952 (2004); *Richard R. Zaragoza, Esq., Gregory L. Masters, Esq., et al.*, Letter, 24 FCC Rcd 5743, 5744 (MB 2009).

Objection's Second Supplement includes a November 16, 2007, field-strength measurement report. Arzuaga asserts that the report provides additional support for his prior claim that the Station's facility is incapable of providing the required 70 dBμ service to Cidra.³³ New Life contends that Arzuaga's submission should not be accepted pursuant to Section 1.106(c) of the Rules³⁴ because the consideration of arguments first raised on reconsideration undermines the Commission's important interest in the orderly authorization of broadcast services.³⁵ New Life also argues that the Commission has repeatedly rejected the use of field-strength measurements against an applicant that has relied on the standard FM prediction methodology to demonstrate compliance with the Rules. In any event, New Life asserts that the November 2007 Report violates Section 73.314(a) of the Rules, which, it claims, states that field-strength measurements may be submitted only in the context of a "rule making proceeding" or "upon the request of the Commission."³⁶

We decline to consider the submitted field-strength measurement report. Where, as in this case, a license application demonstrates community coverage utilizing the standard prediction method set forth in Section 73.313, alternative methodologies will not be accepted.³⁷ As discussed above, the staff has previously determined that terrain does not materially impede service to Cidra. We therefore will deny the Objection.

Conclusion/Actions. Accordingly, for the reasons discussed above, IT IS ORDERED, that by Josantonio Mellado-Romero, *et al.*'s May 8, 2006, Petition for Reconsideration IS DENIED.

IT IS FURTHER ORDERED, that Josantonio Mellado-Romero, *et al.*'s June 28, 2006, unauthorized pleading IS DISMISSED.

IT IS FURTHER ORDERED, that Jose J. Arzuaga's November 23, 2007, Supplement to the Petition for Reconsideration IS DISMISSED.

³³ See Objection's Second Supplement, Engineering Statement (the "November 2007 Report"). JMR states that its 2006 Tech Note 101 engineering statement indicated that the Station's facility would place a signal level of 70 dBu or greater over 23 percent of the community of Cidra. The November 2007 Report claims that only 17 percent of the community of Cidra would receive a measured signal level of 70 dBu or greater. *Id.* at 2.

³⁴ 47 C.F.R. § 1.106(c); *see also* 2007 Opposition at 3.

³⁵ 2007 Opposition at 3, citing *Idaho Broadcasting Consortium, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5264 (1996) (Commission need not examine terrain obstruction/coverage study on reconsideration, when original petition to deny did not include that study).

³⁶ *See* 2007 Opposition at 4.

³⁷ *See, e.g., Letter to Lee Shubert, Esq.*, 10 FCC Rcd 3159, 3160 (MMB 1995). There, in a multiple ownership case, Commission staff rejected a petitioner's attempt to apply (Longley-Rice) Tech Note 101 calculations in order to disqualify an assignment application that had demonstrated compliance with 47 C.F.R. § 73.3555 using standard calculation methods set forth in Section 73.313, holding that requiring applicants with conforming applications to defend applications against alternative prediction methodologies would result in unreasonable delay to the applicants and unnecessary administrative burden upon the limited technological resources available to the Commission for evaluating alternative prediction studies. *Id.* *See also Shaw Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 5852, 5853 (2009).

IT IS FURTHER ORDERED, that Jose J. Arzuaga's June 19, 2007, Informal Objection and concomitant supplements ARE DENIED.

IT IS FURTHER ORDERED, that New Life's Broadcasting, Inc.'s application for covering license (File No. BLH-20070518ABQ) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Richard F. Swift, Esq.
Lee J. Peltzman, Esq.
James L. Oyster, Esq.